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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 75

WEYERHAEUSER STEAMSHIP COMPANY,

Petitioner,

against

NACIREMA OPERATING CO., INC.,

Respondent.

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

The Questions Presented

1. Whether there is sufficient evidence in this record to require submission to the jury of the issue of the ship owner's right to indemnity against the stevedoring contractor, where the ship owner itself has been held liable to the plaintiff because of its independent, affirmative negligence.

Statement

The plaintiff in the main action, a stevedore in the employ of respondent, Nacirema Operating Co., was injured on board the liberty ship "F. E. Weyerhaeuser" in Boston Harbor, when a piece of lumber fell from a shelter erected over the winch at #1 hatch, and struck him (R. 33).

The injured workman sued the ship owner, alleging negligence of the owner and unseaworthiness of the vessel.

The ship owner impleaded the workman's employer, claiming a right to indemnity at common law and under the provisions of the stevedoring contract.

The case was tried before Judge McGohey and a jury in the Southern District Court of New York. At the close of the entire case the trial court decided to make separate submissions to the jury of the issues involved in the main action and the issues raised by the cross-complaint. The issues in the main action were first submitted to the jury, which returned a verdict in favor of the plaintiff against the ship owner on the negligence count only, absolving the ship from the charge of unseaworthiness. Based upon the findings of fact necessarily implicit in the jury's verdict, the court directed a verdict in favor of the impleaded defendant against the ship owner.

The ship owner appealed to the Court of Appeals for the Second Circuit from the judgment in favor of the impleaded defendant only. That judgment was affirmed by a divided court. On petition by the ship owner, certiorari to this court was granted on March 11, 1957.

There was unanimous agreement among the witnesses that shelters such as the one from which the piece of lumber fell on the plaintiff are customarily erected by longshoremen in all harbors of the United States as a protection for winchmen against the weather. They are temporary structures constructed of ship's dunnage with a tarpaulin roof, the tarpaulin being furnished by the ship or taken from the longshoremen's gear house (R. 42). The particular shelter involved in this case, in addition to its tarpaulin roof, had a piece of loose tarpaulin and some pieces of loose lumber thrown on top (R. 35).

The shelter was about seven feet high and four or five feet wide (R. 28), and what was on top of the shelter could not be seen from the deck level (R. 35).

It was the testimony of the plaintiff's witnesses that the shelter was already erected when the ship docked in Boston (R. 40). Implicit in the jury's verdict in favor of the plaintiff is a finding of fact that such was the case, and a further finding that the ship had an opportunity to see, and did see, the shelter before the plaintiff's accident and failed to make it secure. For the court had specifically instructed the jury that the plaintiff could not recover in negligence unless the jury found that the shelter was in place when the ship docked, and that the ship had an opportunity to see, and did see, the shelter and failed to make it secure. The instructions on that point were as follows:

> "Now, if you find from the evidence that the structure, that is this shelter, was on the ship when it came into Boston Harbor and that the ship offered it to the stevedores to use and work with, and if you find that in permitting that to be there the ship was guilty of some act of negligence, as I have defined it to you, then you could find a verdict for Mr. Connolly. But if you find that the shelter was not on that ship as he claims, or if you find that the accident did not happen as he claims it happened, then on this issue of negligence you would have to bring in a verdict for the ship.
>
> * * * * * *
>
> "Going back for a minute to the negligence, in order to find negligence on the ship you would have to find, for instance, that they had an opportunity to see that structure, that they did see it and that they took no steps to make it safe and to keep that wood down there." (R. 104, 106)

There was testimony in the plaintiff's case that shelters erected by longshoremen are taken down by the ship's crew, in every well run ship, as soon as it is made ready for its voyage (R. 59, 60). This testimony was corroborated by the ship's own witnesses, who testified in addition that

failure of the ship's personnel to remove the shelters before the ship got under way, would involve a dereliction in the performance of their duties (R. 73, 80). The testimony of the ship's captain in that regard was as follows:

"Q. Captain, you heard the witness yesterday, an able bodied seaman, who testified with respect to the custom at sea of disposing longshoremen's shelters such as this, did you not? A. Yes, sir.

Q. Do you agree with what he stated as to the custom carried out at sea with regard to the disposition of these shelters as part of making the ship ready for sea? A. Absolutely.

Q. Is that an invariable order on board your ship that that shall be done? A. Always.

* * * * * *

Q. Just a few more questions, Captain. Assuming that shelters had been erected in New York, and assuming that they had been left on the vessel on its way to Boston, that would have been carelessness on the part of your shipmate, wouldn't it, Captain? A. It would be carelessness on the part of myself and the chief mate.

Q. Well, it would be essentially carelessness on the part of the chief mate, wouldn't it? A. No, I would say that I would feel the responsibility very definitely.

* * * * * *

Q. Now, Captain, it is the chief mate's responsibility, if there were shelters on this vessel, to see that they were taken down, is that correct? A. I can't pin it down directly to the chief officer. It is all our responsibility." (R. 73, 80, 81)

The testimony of the chief officer on the same subject was as follows:

"Q. Now, Mr. Kern, if there were shelters on when the vessel reached Boston, actually that would mean

that you would have been derelict in your duty. A. I wouldn't be working any more.

Q. Isn't that what it amounts to, that your job is to see that these shelters are taken down; is that correct? A. That is correct.

Q. And if they were on when the vessel reached Boston, it would have meant that you were derelict in your duty? A. Correct." (R. 95, 96)

The vessel had docked at New York with a full cargo of lumber, and was partially unloaded there by employees of the respondent. No one could, or did, testify when the particular shelter involved in this case was erected. The jury's verdict has established as a fact that it was erected before the ship docked at Boston, and the opinion of the Court of Appeals states that there was sufficient evidence to justify an inference by the jury that the shelter was erected by respondent's employees at New York. There is no direct evidence, and it is submitted no evidence from which an inference can be drawn, that the boards which fell on the plaintiff were placed on top of the shelter by respondent's employees. The inference that they were put there by the ship's crew during the voyage from New York to Boston to keep the tarpaulin from being blown away by the wind was at least as probable as the inference that they were originally placed there by the longshoremen when they built the shelter.

Based upon the evidence and upon the findings of fact which are implicit in the jury's verdict, it is the respondent's position that the ship owner did not make out a cause of action for indemnity, either at common law or by contract, and that a verdict in favor of the respondent was, therefore, properly directed by the trial court.

Summary of Argument

1. The verdict of the jury, reached in accordance with the instructions of the trial court, establishes that the ship was guilty of independent, affirmative negligence in furnishing to the stevedores at Boston a shelter which was defective, and which the ship knew to be defective. Giving the ship owner the benefit of every favorable inference that could be drawn from the evidence, consistent with the findings of fact made by the jury, the most that was established was that the ship owner and the stevedoring contractor were joint tort-feasors. At common law one joint tort-feasor has no right to indemnity against the other.

2. So far as the contractual relations between the petitioner and the respondent are concerned, the stevedoring contract in New York incorporated by reference the customs of the harbor with reference to stevedoring operations. One of these customs was that the stevedores erect temporary shelters and that these shelters are removed by the ship. If there was a breach of that contract, it was the ship's default in failing to conform to the custom and remove the shelters when the ship left the harbor. At Boston the ship owner presented the shelter to the stevedores for use, thereby warranting its safety. The worst that can be charged against the stevedores there is that they failed to discover that the shelter was unsafe. Since they had a right to rely upon the implied warranty of safety by the ship, their failure to discover that the shelter was unsafe was not such a violation of the stevedoring contract as would render their employer liable to indemnify the ship owner for injuries caused because a shelter which the ship owner warranted to be safe turned out to be unsafe.

ARGUMENT

POINT I

In the light of the jury's verdict, the evidence adduced was not sufficient to create an issue of fact as to the petitioner's right to indemnity at common law. The direction of a verdict on that count by the trial court was, therefore, proper.

The petitioner's contention that it was deprived of its constitutional right to a jury trial is in effect begging the question. If no issue of fact as to its right to indemnity survived the jury's verdict, then the trial court was obviously correct in directing a verdict in favor of the third-party defendant. (*Galloway* v. *United States*, 319 U. S. 372, 373). If an issue of fact as to its right to indemnity did survive the jury's verdict, then concededly it was entitled to go to the jury to have that issue of fact determined. And that is the whole problem which is involved on this appeal.

The petitioner on this appeal contends that it was entitled to go to the jury on its claim for indemnity at common law as well as under the provisions of its contract. The verdict of the jury in favor of the plaintiff in the main action would seem to bar effectively any right to indemnity by the petitioner against the respondent at common law.

The verdict of the jury, which must be assumed to have conformed to the court's instructions, establishes that the shelter was on the deck when the ship docked at Boston; that it was offered to the stevedores for use by the ship owner; and that it was defective and unsafe, and that the ship owner knew that it was defective and unsafe, because, under the circumstances, notice to the ship owner of the

defect was an essential prerequisite to liability. In addition, the jury must have found, as the ship's officers conceded, that the employees of the ship were negligent in failing to remove the shelter when they made ready for their voyage to Boston. The jury's findings convict the ship owner of negligence independent of, and entirely unrelated to, any negligence that the stevedores might have been guilty of, and imposed upon the shipowner a liability referable to its own default and not to anything that the stevedores did or failed to do. The petitioner has been held liable because it failed to perform its own independent obligation to remove the shelters when it left New York, and because it presented the shelters for use to the stevedores in Boston, with knowledge that the shelter involved was unsafe. Under that condition of the record the court had no choice but to direct a verdict in favor of the respondent on the cause of action for indemnity at common law. (*Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282; *American Mutual Liability Ins. Co.* v. *Matthews*, 182 F. 2d 322; *Schwartz* v. *Merola Bros.*, 290 N. Y. 145.) One who has himself been guilty of affirmative, concurrent negligence is not entitled to indemnity. (*Washington Gas Co.* v. *Dist. of Columbia*, 161 U. S. 316; *Oceanic S. N. Co.* v. *Co. T. E.*, 134 N. Y. 461.) Nor is one who concurs in a wrong which results in damage entitled to indemnity. (*Sheffield* v. *Yaeger, et ano.*, 260 App. Div. 855, affd. 287 N. Y. 604; *Adler* v. *Tully & DiNapoli, Inc.*, 300 N. Y. 662.)

In *Adler* v. *Tully & DiNapoli, Inc., supra,* the opinion states:

> "The rule is well established that no recovery over will be allowed as between joint tort-feasors where the one seeking indemnity concurred in the wrong. The verdict of the jury established affirmatively the knowledge of [the general contractor] of the defective mechanism and the failure of said defendant having such knowledge to take proper precautions to prevent the accident."

Assuming in this case that the stevedores erected the shelter at New York, they had no reason to anticipate that it would remain on the ship until it reached Boston. By established custom the shelter would be removed by the ship's personnel. When the stevedores left the ship at New York, the shelter passed into the exclusive possession and control of the ship and it remained in possession and control of the ship until it was turned over to the stevedores at Boston. The ship's action in failing to remove the shelter, and in offering it to the stevedores for use with an implied representation that it was safe, constitutes independent, affirmative negligence which bars a right to indemnity.

In that connection it should be emphasized that there is no permissible inference from the evidence that the board which fell and struck the plaintiff was put on the shelter by the longshoremen. The inference that the longshoremen erected the shelters at New York is based entirely on circumstantial evidence. It is an inference drawn from the conceded custom that longshoremen build these shelters for protection against the weather. From the evidence that such a custom existed, it might be inferred that the longshoremen erected the shelter at New York. But the further inference that they placed on top of the shelter loose boards and tarpaulin is an inference based on an inference and is an exercise in pure speculation. It is well established law that, "Circumstantial evidence * * * consists in reasoning from facts which are known or proved, to establish such as are conjectured to exist; but the process is fatally vicious, if the circumstance from which we seek to deduce the conclusion depends itself upon conjecture." (*People* v. *Kennedy*, 32 N. Y. 141, 146; *People* v. *Fitzgerald*, 156 N. Y. 253.)

Further, the evidence in the case would seem to negative any such inference. The crew of the ship testified that the weather from New York to Boston was such that it would be impossible for the loose tarpaulin to remain

on top of the shelter; the shelter itself might withstand the weather, but not the loosely placed tarpaulin. The cargo on this ship was a cargo of lumber, and the inference that the pieces of lumber were thrown on top of the shelter during the voyage from New York to Boston to hold down the canvas, was at least as likely as the inference that they were placed upon the top of the shelter by the stevedores at New York. When the evidence is susceptible of two inferences, one of which imposes liability on the defendant and the other of which exonerates him, that which exonerates him from liability must be accepted. (*Digelormo* v. *Weil,* 260 N. Y. 192, 200; *White* v. *Lehigh Valley R. R. Co.,* 220 N. Y. 131, 135.)

The dissenting opinion in the Court of Appeals points out that, if it were assumed that the stevedore erected an unsafe shelter in New York, the mere fact that the ship was concurrently negligent in not removing it would not insulate the stevedore from liability to the injured party. The respondent has no quarrel with that statement. However, the rights of the injured workman and the right of the ship to indemnity stand on an entirely different basis. The injured third-party might well recover against the stevedore in such circumstances were it not for the provision of the Longshoremen's and Harbor Workers' Act; but the ship owner, being concurrently negligent, and a joint tort-feasor, would not be entitled to indemnity.

The respondent, however, cannot agree with the further statement in the dissenting opinion that the only negligence of which the ship was guilty was the negligence of "allowing Nacirema to use an unsafe shelter * * *". (R. 127) The ship did more than merely allow Nacirema to use an unsafe shelter. It offered the shelter to the stevedores for use in their work, thereby warranting its safe condition. In failing to tear down the shelter, the ship adopted the structure as its own and presented it to the longshoremen at Boston for their use. Under those circumstances

it was under a duty to make such inspections as were reasonable to insure that the structure was safe. (*Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Gucciardi* v. *Chisholm*, 145 F. 2d 514.) Assuming that the vessel and the stevedore were alike derelict in their duty of inspection, they were at most joint tort-feasors and neither was entitled to indemnity from the other for losses arising from a failure to inspect. (*Union Stock Yards Co.* v. *Chicago, D. & Q. R. Co.*, 196 U. S. 217, 228.)

In connection with the claim for common law indemnity, there is involved in this case a question which has so far not become material. The respondent, as employer of the injured workman, was liable for workmen's compensation under the Longshoremen's and Harbor Workers' Act. To allow indemnity at common law is to hold the employer liable in negligence for the workman's injuries. It would seem that the exclusionary provisions of the Longshoremen's and Harbor Workers' Act would be a sufficient defense to such a claim.

That problem has already been considered by this court but has not been decided. (*Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124.) In jurisdictions where indemnity at common law has been allowed against an insured employer, the basis of liability has been held to be an implied contract by the employer to indemnify the third-party for damages primarily resulting from the employer's active negligence. (*Westchester Lighting Co.* v. *Westchester County Small Estates Corp.*, 278 N. Y. 175.) It would seem to be just as logical to imply a contract on the part of one joint tort-feasor to contribute his proportionate share of a judgment resulting in part from his negligence. The theory in so far as it affects joint tort-feasors has been rejected by the Federal Courts. (*Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406; *American Mutual Liability Ins. Co.* v. *Matthews*, 182 F. 2d 322.) There would seem to be no valid reason for adopting it in cases involving indemnity rather than contribution. (*Brown* v. *American-Hawaiian S. S. Co.*, 211 F. 2d 16.)

Liability imposed upon an insured employer for indemnity at common law is liability for damages "on account of" an injury to his employee. It is to do indirectly what the statute prevents being done directly. (*Johnson* v. *The United States, et al.*, 79 Fed. Supp. 448.)

However, since the verdict of the jury in this case establishes that the ship owner's liability was based upon its own affirmative negligence, independent of any negligence that might be ascribed to the stevedore, the question of the effect of the exclusionary clauses of the Longshoremen's and Harbor Workers' Act would still seem to be irrelevant.

POINT II

There was no breach by the respondent of its contractual obligation to do the stevedoring work properly and safely.

At the outset it should be emphasized again that, while the direct proof of custom furnishes a basis for an inference that the shelter was built by the stevedores at New York, it does not furnish a basis for the further inference that the shelter was erected negligently at New York. The lumber on top of the shelter was no part of the structure, and there is no evidence that it was customary to place lumber on top of shelters. The dilemma becomes apparent in the statement in the petitioner's brief, at page 14, that, "If the board was not placed on the shelter at Boston then it was placed there at New York * * *". But there is nothing at all to sustain an inference that the board was placed on the shelter at Boston, and no such issue was submitted to the jury by the court. The boards on top of the shelter might have been put there at New York or they might have been put there during the voyage from New York to Boston, and one inference is just as probable as the other. With the proof in that condition, the petitioner has obviously failed to establish an essential element of its case.

So far as the claimed breach of contract is concerned, there were two contracts involved here and the petitioner does not make it clear which contract he claims was breached. At New York, respondent contracted with the petitioner to discharge part of the cargo. The erection of shelters on the ship, if it entered into the contract at all, entered merely as an incidental consideration and not as a term or provision of the contract. As in all contracts, it must be assumed that both sides, in making the agreement, took into consideration the established customs of the harbor in so far as they affected the agreement. One of these customs was that stevedores, when loading and unloading ships, erect shelters for protection against the weather, and that the ship's crew removes those shelters before the ship leaves the harbor. The ship understood that the stevedores would erect shelters, and the stevedores understood that the ship would remove them. This involved reciprocal obligations. Neither party contemplated that the shelters would be left standing and certainly the stevedores could neither foresee nor anticipate any such procedure.

If the ship chose to allow these flimsy temporary structures to remain standing during the voyage from New York to Boston, subjected to the hazards of heavy weather, and furnished them to the stevedores for use in Boston, knowing, as the jury has found it did know, that the structure was defective, then the ship failed to live up to the terms of its contract and cannot look to the stevedore for indemnity. The respondent had a right to rely upon the ship's performing its part of the contract. As was pointed out in the majority opinion in the Court of Appeals, it could not reasonably have been foreseen that the ship would not perform its contract and remove the structure; and, even if it had been proven that the shelter was negligently constructed in New York, the stevedore could not be held liable for a breach of its contract because it could not have foreseen that the ship would have allowed the structure to remain standing and have offered

it to the workmen in Boston as a safe appliance for use in the unloading operation.

This court's decision in *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, holds nothing to the contrary. In the *Ryan* case, *supra*, the stevedoring contractor was held liable because it had breached an essential term of its contract of safe stowage. This court held that the ship's failure to discover that breach of contract by the stevedore was not a defense to the claim for indemnity. The decision does not hold, as the petitioner here seems to contend it does, that, if the ship itself is guilty of a breach of the contract proximately resulting in damage, it is still entitled to indemnity.

The contract to unload at Boston made by the respondent with the petitioner was separate and distinct from the contract made at New York. At Boston, in connection with the stevedoring contract, the ship handed over to the stevedores the shelters, as appliances to be used in connection with their operations. No matter by whom the shelters had originally been erected, they had been taken over by the ship and had been in the ship's exclusive possession and control for several days before the ship docked at Boston. The ship could and should have demolished them; instead it adopted them as its own and furnished them to the stevedores for use. In doing that, the ship warranted that they were reasonably safe for the use to which they were going to be put, and the fact that the structure which was involved in this accident was unsafe constituted a breach of that warranty.

It is suggested that the failure of the stevedores to discover the defect before using the shelter constitutes a breach of its contract to perform its work safely and properly. But the law seems to be well settled that where an appliance is furnished by the ship for use by the stevedores, they may rely upon the ship's warranty of safety unless the condition of the appliance is such as to excite

suspicion or to suggest defects or danger. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Liverani* v. *Clark*, 231 N. Y. 178; *O'Dougherty* v. *Postal Telegraph Cable Co.*, 134 App. Div. 298.)

The proof here is that the shelter, on casual inspection, looked perfectly all right. It was about seven feet tall and the lumber which was on top of the shelter could not have been seen unless the stevedores had climbed up on some height to inspect it. Since there was nothing about the appearance of the shelter to excite their suspicion, the stevedores could reasonably rely upon the ship's warranty that the shelter was safe.

It is contended by petitioner that the ship's failure to remove the shelter did not constitute a breach of any duty owed by it to the stevedore. In this point of view the dissenting opinion seems to concur. It is difficult to understand that position. It was conceded here that the custom with respect to the erection and removal of shelters was a uniform, continuous, and well settled usage, known to the ship and to the stevedoring contractor. The parties must be presumed to have made their contract in reference to that custom. These shelters are flimy structures, erected for a purely temporary use, and not contemplated to remain after their temporary use has been served. To say that the ship owed no duty to the stevedoring contractor to remove them after they had served their purpose, is to say that the ship owner had it in its power to put the stevedoring contractor in a position where he might continue to be liable for the condition of a temporary structure which, if left standing, could well constitute a dangerous hazard, long after the structure had passed out of the control of the stevedoring contractor and after the stevedoring contractor was deprived of the opportunity to remove the structure or to make it safe. Quite obviously the custom as to the removal of these shelters was designed to protect the stevedoring contractor just as much as it was designed to protect the personnel of the ship. And

the ship owner's failure to remove the shelters constituted a breach of a duty owed by the ship owner to the stevedoring contractor, a duty which arose out of the stevedoring contract.

CONCLUSION

The judgment appealed from should be affirmed.

Respectfully submitted,

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